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HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington DC 20554

Re: CS Docket No. 99-230

Dear Ms. Salas:

On behalf of Seren Innovations, Inc., we enclose for filing an original and four (4) copies of Seren's Reply Comments in the above-referenced proceeding. We have also enclosed a "File Copy", and ask that you date-stamp it and return it to the courier.

Very truly yours,

James W. Olson

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS

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EXECUTIVE SUMMARY

Seren Innovations, Inc. ("Seren") is a new entrant into the multichannel video programming distribution ("MVPD") marketplace, with cable franchises in California and Minnesota. Seren is dedicated to bringing competition to the entrenched cable monopolists in its areas of operation as part of its integrated Internet, video and telephone broadband network.

Progress toward bringing competition to the MVPD market has been far too slow. Seven years after passage of the Cable Competition and Consumer Protection Act in 1992, the cable industry retains its monopoly position with over 80 percent of the MVPD market nationally. Further, the industry is rapidly consolidating both nationally and regionally, which will increase its monopsony power vis-à-vis programmers. Given this market structure, it is not surprising that cable's performance as measured by the most basic indicator, price, has been poor, and that its conduct has demonstrated an intent to exclude rivals or raise their cost of entry by exerting its market power over programmers.

In particular, the giant MSOs have moved to deny their rivals access to popular programming, including both national programming networks and regional sports channels. Seren itself has been denied access to several non-vertically integrated channels. Problems of this nature will only be exacerbated as the cable industry rapidly consolidates nationally to accompany its local and regional MVPD monopolies.

Virtually every respondent in the initial Comment round in this proceeding, save the cable incumbents, cited access to programming as a key competitive issue, and supported their comments with highly specific incidents of anti-competitive actions by the cable monopolists involving programming.

This Commission should fulfill its responsibility to promote MVPD competition ***now*** by focusing its attention on actions to deter the cable industry from using its market power to raise rivals' costs and thus slow the progress of competition. To the extent the Commission believes it lacks the power to act, it should recommend to Congress that it take appropriate action to ensure that all video markets are opened to competition. One specific recommendation the Commission should make is that legislation be enacted to prohibit cable MSOs from using their monopoly power to enter into exclusive contracts with non-vertically integrated programmers.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS

Seren Innovations, Inc. ("Seren") hereby respectfully submits these Reply Comments to the initial comments filed in response to the Commission's *Notice of Inquiry* for its Sixth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming.

I. SEREN IS DEDICATED TO PROVIDING COMPETITION IN THE MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION MARKETPLACE

Seren is a non-regulated subsidiary of Northern States Power Company formed in 1996 to provide high-speed Internet, cable television and telephone services to residential and business customers through a state-of-the-art hybrid fiber optic and coaxial cable broadband network. Seren has received cable television franchises in St. Cloud, Sartell, Sauk Rapids and Waite Parke, Minnesota and presently is providing cable, high-speed Internet and telephone service in St. Cloud and Waite Parke. Seren was granted a cable franchise in Concord, California on July 27, 1999 and has applications pending for cable franchises in Walnut Creek, Danville, Pleasant Hill, Clayton and in unincorporated Contra Costa County, California. Seren plans to file applications for franchises in other Contra Costa communities in the coming months.

As of September 1, 1999, Seren's St. Cloud area system will expand to offer its cable subscribers 239 channels, more than 150 of which will employ digital technology. At that time Seren's $11.95 Basic tier will be expanded from twenty-two to thirty-one channels and its $26.95 Premier Pak from fifty-four to eighty channels at no additional charge. Digital offerings will include a Digital Family Tier, including eight Discovery channels and Noggin', among others, as well as other grouped tiers such as Digital Sports, Digital Life, Digital Music, and Digital Movie Lovers.

Seren is dedicated to fulfilling the intent of the Telecommunications Act of 1996[1] by providing competition to entrenched incumbents in cable and telephone markets and by offering advanced services to both business and residential customers.

II. THE CABLE INDUSTRY'S PERSISTENT MONOPOLY STRUCTURE

The enduring monopoly status of the cable industry, combined with its poor performance and egregiously exclusionary conduct, led to the passage of the Cable Television Consumer Protection and Competition Act of 1992.[2] Section 628(g) of the 1992 Act requires an annual report to Congress on the status of competition in the video programming delivery market.

The five previous reports pursuant to that requirement chronicle the remarkable persistence of monopoly power in the hands of the cable industry. Nationally, cable's market share has declined only from ninety-three percent in1994 to eighty-five percent in 1998.[3] As Chairman Kennard put it in his statement on last year's study: "Our annual report shows that,

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

2 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

3 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Docket No. 98-102, Fifth Annual Report, 13 F.C.C. Rcd 24,284, 24,418 (1998) ("*1998 Competition Report*"), Appendix C, Table C-1.

although competition is increasing, the level of competition that consumers are seeking has not yet arrived."[4]

Significantly, all of the decrease in cable's market share has come from the introduction of Direct Broadcast Satellite ("DBS") service, which in 1998 accounted for 9.4 percent of the Multichannel Video Programming Distribution ("MVPD") market. But DBS service to date has been a high-end niche product which offers little price competition to cable. As Chairman Kennard has said: "DBS, however, remains primarily a high-end product or a way to receive multichannel video service in areas cable does not reach."[5] Even if Congress acts to allow DBS to offer local programming,[6] DBS will not be able to offer the integrated package of voice, video and data products that the cable incumbents are beginning to deploy. As Commissioner Tristani put it last year: "In a truly competitive market things would be different . . . It shows how starved we are for competition that anyone would look at the competitive choice provided by DBS and declare victory."[7] To provide full competition to the cable industry, including to its new bundled packages, the public and this Commission must look to companies such as Seren, and others, which offer fully competitive services.

The cable industry trumpets the modest decline in its national market share over the past six years as "inescapable" proof of "robust" competition.[8] Even accepting NCTA's

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4 *1998 Competition Report*, 13 F.C.C. Rcd at 24,481, Statement of Chairman William Kennard.

5 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 F.C.C. Rcd 1034, 1238 (1998), ("1997 Competition Report"), Statement of Chairman William Kennard.

6 Passage of such legislation still will not result in DBS carriage of local signals in most smaller communities for many years.

7 *1998 Competition Report*, 13 F.C.C. Rcd at 24,489, Statement of Commissioner Gloria Tristani.

8 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Notice of Inquiry*, ("1999 *Notice of Inquiry*"), CS Docket No. 99-230 (adopted June 18, 1999), *Comments of National Cable Television Association*, at 1 (Aug. 6, 1999).

figure of eighty-two percent as cable's current share of the MVPD market, these claims are flatly wrong. A market share of eighty-two percent clearly supports an inference of monopoly power. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (eighty percent share supports inference of monopoly power); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994) ("[a]n eighty percent market share is within the permissible range from which an inference of monopoly power can be drawn"), *cert. denied*, 513 U.S. 150 (1995); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 981 (5th Cir. 1977) (seventy-one to seventy-six percent share "is sufficient to establish a monopoly power"), *cert. denied*, 434 U.S 1087 (1978).

No doubt aware that an eighty-two percent market share is clearly a monopoly, the NCTA attempts to discount the meaningfulness of market share data.[9] However, it is well established that the "principal measure of actual monopoly power is market share ...." *U.S. Anchor Mfg., Inc. v. Rule Indus, Inc.*, 7 F.3d 986, 999 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994); *see also SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, No. 99-1009, 1999 U.S. App. LEXIS 19715, at *10 (1st Cir. Aug. 19, 1999) ("Market share often serves as a proxy for market power").

Far more significant than the modest decline in cable's national market share is the rapid consolidation of the cable industry that has occurred since the 1998 Competition Report. As of May, 1999, it was reported by *Broadcasting & Cable* magazine that ten of the cable MSOs on its Top twenty-five MSO list from 1998 had disappeared and in the three short months since that report at least five MSOs from the 1999 Top twenty-five list have also been

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9 *Comments of National Cable Television Association, 1999 Notice of Inquiry* at 8-10 (Aug. 6, 1999).

swallowed up.[10] The top seven MSOs apparently now account for approximately eighty-eight percent of cable subscribers, up from sixty-six percent a year ago.[11]

Related to and reinforcing the market power created by the overall MSO consolidation is the dramatic increase in clustering that has occurred as MSOs trade systems to achieve total dominance in a particular region. This further insulates MSOs from competition, gives them even more market power over regional sports channels, and makes practical the migration of such programming from satellite to terrestrial delivery to evade the program access rules.

The fact that this unprecedented wave of consolidations dramatically strengthens the hand of the top cable MSOs in dealing with programmers and increases the likelihood of collusion in such dealings was recognized by the Commission last year:

> Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful.[12]

When one does look beyond the cable industry's increasingly concentrated structure to its performance, as the industry would urge, the results are as dismal as the high market share would lead one to predict. Cable prices have consistently increased at a greater rate than the overall price index, usually at a dramatically higher rate. In 1996, Consumer Price Index figures showed that cable rates rose by ten percent, and in 1997 the increase was 7.5

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10 John M. Higgins, *Top MSOs Own 90% of Subs*, Broadcasting & Cable, May 24, 1999, at 34. Since that time the acquisitions of Falcon, Fanch and Bresnan by Charter, Multimedia by Cox and Comcast's offer to up its ownership of Jones Intercable to 79 percent have been reported.

11 *Cox Spurs Cable Consolidation With $4-Billion Purchase of TCA*, Communications Daily, May 13, 1999, at 1, updated to include subsequent acquisitions by Top 7 MSOs.

12 *See 1998 Competition Report*, 13 F.C.C. Rcd at 24,362.

percent. In the twelve months ending in June 1998, cable prices rose by 7.3 percent compared to 1.7 percent for the Consumer Price Index, as the Commission reported.[13] For all of 1998, cable's price increase was 6.9 percent compared to 1.6 percent for the Consumer Price Index, a rate more than 400 percent that of inflation.

The NCTA claims that these consistently large price increases are explained and justified by increases in channel capacity. This argument is contradicted by the fact that cable prices have gone down significantly in those few instances where cable faces direct competition from an overbuilder. For instance, as Ameritech has described, when it has entered a market the incumbent has dropped its prices dramatically. In Rochester, Michigan, Ameritech's entry caused AT&T/TCI to lower its price from $50.48 to $39.40; in Crestwood, Illinois, Time Warner lowered its price from $58.33 to $38.45; and in Brooklyn, Ohio, Cablevision Systems lowered its price from $50.33 to $36.90.[14] If cable pricing was as competitive before entry as the industry claims, the arrival of a new competitor would not have resulted in price decreases of this magnitude, ranging from 21.9 to 34 percent in the cases Ameritech cites. When Seren entered the St. Cloud market, it too saw a price response by the incumbent cable operator who offered additional channels to subscribers at no extra charge.

The combination of a persistently high national market share for cable, proxy for its string of local monopolies, the increased concentration of the industry through consolidation, and a performance record of prices far above a competitive level, matched by price increases consistently higher than inflation, provides ample support for a finding of monopoly power and its exercise by the cable industry. Such a conclusion is buttressed by cable's exclusionary conduct, evidenced by behavior such as extracting exclusive contracts from non-vertically integrated programmers and moving programming from satellite to terrestrial distribution to avoid the program access rules.

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13 *Id.* at 24,288.

14 *1999 Notice of Inquiry, Comments of Ameritech New Media, Inc.* (Aug. 6, 1999), Exhibit I.

III. CABLE INDUSTRY DOMINANCE OVER PROGRAMMING

One of the chief abuses which led to the passage of the 1992 Cable Act was the cable industry's practice of depriving potential rivals of access to popular programming. Congress directed the Commission "to address and resolve the problem of unreasonable cable industry practices, including restricting the availability of programming...."[15] This was accomplished either by vertically integrating into programming and then denying the programming to alternative MVPDs or by entering into exclusive contracts with non-vertically integrated programmers. The economic effect of either course is similar. As a basic economics text puts it: "Firms often write complex contracts that restrict actions of those with whom they deal. These vertical restraints can approximate the outcome from vertically merging."[16]

The key point is that cable's local franchise monopolies give large cable MSOs monopsony power in the market to purchase programming, power that they can exert either by acquiring programmers or by extracting contract terms that tend to exclude rivals or raise their costs. As Chairman Kennard reported to Congress: "[i]t is probably fair to say that the general conclusion is that an analysis *should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself*."[17] Such conduct can successfully deter entry by rivals by forcing them to enter the industry at two separate levels simultaneously; that is, a potential entrant must commit resources to construct both new distribution facilities and to create programming.[18]

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15 H. Rep. No. 102-862 at 93 (1992), *reprinted in* 138 Cong. Rec. H 8308, H8332 (Sept. 14, 1992).

16 Dennis Carlton & Jeffrey Perloff, *Modern Industrial Organization*, 499-500 (Harper Collins, 1999).

17 Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin of Jan. 23, 1998, Responses to Questions at 3 (emphasis supplied) (the "Kennard Letter").

18 *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 223-24 (1986); Michael L. Katz, *Vertical Contractual Relations in* 1 HANDBOOK OF INDUSTRIAL RELATIONS 706, 709 (Schmalensee & Willig eds. 1989). *See also 1997 Competition Report*, 13 F.C.C. Rcd at 1045 ("exclusive

That the problem of access to programming is far from solved is testified to by the fact that no fewer than eight of the respondents to the Commission's *Notice of Inquiry* described program access problems of one type or another.[19] This group included companies offering MVPD service via virtually every mode of competition: wired overbuild, DBS, MMDS and SMATV.

The recent General Accounting Office study of competition to cable lends support to the concerns of these competitors regarding cable's ability to exercise monopsony power over programmers.

> [M]ost of our expert panel members stated that program suppliers that are not vertically integrated (such as MTV, A&E Network, and The Weather Channel) may be very dependent on large cable companies.[20]

This dependence is increasing as the cable industry consolidates its grip nationwide and increases the size of its regional clusters. Even before the recent wave of takeovers, a majority of the Federal Trade Commissioners wrote in connection with Time Warner's takeover of Turner Broadcasting:

> [T]he launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40%-60% of subscribers .... TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 26.7% and 17%, respectively.

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arrangements can be used to deter entry and inhibit competition from other MVPDs in markets for the delivery of multichannel video programming")

19 *See Notice of Inquiry, Comments of Wireless Communications Ass'n. Int'l, Inc., Comments of BellSouth Corp., Comments of EchoStar Satellite Corp, Comments of DIRECTV, Inc., Comments of Ameritech New Media, Inc., Comments of OpTel, Inc., Comments of Hiawatha Broadband Communications, Inc., & Comments of RCN Corp.* (all filed Aug. 6, 1999).

20 General Accounting Office, *Report to the Subcommittee on Antitrust Business Rights, and Competition, Committee on the Judiciary, U.S. Senate: Telecommunications, The Changing Status of Competition to Cable Television* 22 (July, 1999).

> Carriage on one or both systems is critical for new programming to achieve competitive viability.[21]

An area of programming exclusivity that is of increasing concern is that of sports programming, in particular where access to the games of popular local teams is concerned. Control over regional sports programming has emerged as a key tool on the part of cable incumbents to raise the cost of entry by rivals. As the Commission said last year, "Sports programming … increasingly warrants special mention because of its widespread appeal and strategic significance for MVPDs."[22]

Cable incumbent strategies here vary. Where a regional sports channel is vertically integrated, the cable incumbent may shift from satellite to terrestrial distribution to avoid coverage of the program access provisions of the 1992 Act. Where the regional sports channel is non-vertically integrated, a cable MSO may extort an exclusive contract to deprive its rivals of the programming.[23] The dramatically increased level of clustering makes these even more attractive strategies for large cable MSOs.

IV. SEREN'S EXPERIENCE WITH THE DENIAL OF PROGRAMMING

Seren has had direct experience of the latter behavior, having been denied access to several non-vertically integrated channels. One of the channels Seren would like to offer in its Minnesota franchise area is the Midwest SportsChannel ("MSC"), a twenty-four-hour regional sports network, which offers a wide range of sports programming. Among its programming are Minnesota Twins baseball games, Minnesota Timberwolves basketball games, University of

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21 Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney, *In re Time Warner Inc.*, FTC File No. 961-0004, 1996 F.T.C. LEXIS 389, at * 100 (F.T.C. Aug. 14, 1996).

22 *1998 Competition Report*, 13 F.C.C. Rcd at 24,380.

23 The Cable Services Bureau has specifically found that an exclusive contract between a cable MSO and a non-vertically integrated programmer does constitute a violation of the program access provisions of the Cable Act, 47 U.S.C.§ 548 (1994). *In re Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, No. CSR 5381-P, Memorandum and Order (F.C.C. July 1, 1999).

Minnesota football, hockey and basketball games, and certain St. Cloud State University athletic events. Because MSC televises these popular games, its programming is highly desirable.

MSC is wholly-owned by CBS Broadcasting, Inc., and as such, is a non-vertically integrated channel. When Seren contacted MSC in 1998 to contract for its programming, Seren was told by MSC that it could not make its programming available to Seren because of an exclusive contract it had with TCI, the incumbent cable operator in St. Cloud through its Westmarc Cable Inc. affiliate.

When Seren raised this issue in the AT&T/TCI merger proceeding, AT&T and TCI responded that:

> TCI has been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules. For example, TCI *voluntarily* waived its exclusive rights to the Chicago Cubs baseball games carried on CLTV, a local service in the Chicago area, which was a matter of particular interest to Ameritech. AT&T/TCI will continue to review requests to relinquish exclusivity for services not covered by the program access rules on a case-by-case basis and to act reasonably and responsibly in this area.[24]

However, when Seren contacted TCI to ask it to make good on its representation to the Commission, Seren was told by the regional manager that neither TCI nor Bresnan (the St. Cloud system was shifted from TCI to Bresnan during this period) was willing to waive its exclusivity. To this date Seren has been unable to obtain MSC.

Seren has also been denied access to a number of other non-vertically integrated channels which have exclusive contracts with incumbent cable MSOs, including MSNBC, the Game Show Network and Fox News. Seren's inability to offer these popular channels has hampered its ability to compete -- a classic instance of an entrenched monopolist fending off competition by using its market power to injure its rivals.

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24 *AT&T Corp./TCI*, CS Docket No. 98-78, *Comments and Joint Opposition to Petition to Deny or to Impose Conditions*, at 66 n.143 (F.C.C. Nov. 13, 1998).

V. RECOMMENDATIONS

In its *Notice of Inquiry*, the Commission asked for information regarding the status of competition in markets for the delivery of video programming and what barriers to entry still existed which inhibit competition. It also asked for comments regarding cases of access to programming being denied by non-vertically integrated programmers and whether the coverage of the program access rules was appropriate.

Seren has demonstrated the unsatisfactory state of competition in the MVPD industry, dominated today, as it was when the Cable Act was passed in 1992, by large cable MSOs with local monopolies and monopsony power vis-à-vis programmers, which they use to deter effective entry by rivals. If anything, the situation has worsened as the cable industry has consolidated both nationally and regionally through clustering.

Seren has also shown the limitation of the existing program access regime as interpreted by the Cable Services Bureau to reach only vertically integrated programming. There is no logical or economically-based reason to distinguish between a denial of programming by a vertically integrated cable MSO and a denial of programming resulting from an exclusive contract forced on a non-vertically integrated programmer by a cable MSO with monopsony power. Competition is equally harmed in both cases

If the Commission agrees that Section 628 of the Cable Act cannot be used to reach non-vertically integrated programming, the Commission should recommend to Congress that it explicitly enact legislation to cover the denial of such programming.

Respectfully submitted,

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September 1, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments were served by messenger (indicated by *) or by first-class United States mail, this 1st day of September, 1999, upon each of the parties listed below:

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